No. 30

In the Supreme Court of the United States

OCTOBER TERM, 1952

THE UNITED STATES OF AMERICA, APPELLANT

v.

THE BEACON BRASS CO., INC., AND MAURICE FEINBERG

REPLY BRIEF FOR THE UNITED STATES

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Going beyond the single question of statutory onstruction decided by the District Court, the ppellees seek to argue that the indictment was roperly dismissed because (1) the statute of limi-tions had run (Brief 7-9) and (2) their prosecu-on was barred by *res judicata* (Brief 11-14). We hall show here that neither of these contentions is pen on this appeal, and that both are, in any vent, without merit.

I

nly the Question Decided by the District Court—Whether the Indictment Stated an Offense Within Section 145(b) of the Internal Revenue Code—Is Presented by This Appeal

"The exceptional right of appeal given to the overnment by the Criminal Appeals Act"

(*United States* v. *Borden Co.*, 308 U.S. 188, 192) "contemplates vesting this court with jurisdiction only to review the particular question decided by the court below for which the statute provides." *United States* v. *Keitel*, 211 U.S. 370, 398. This rule, applied in the cited cases, has been repeatedly reaffirmed by this Court. *E.g.*, *United States* v. *Hastings*, 296 U.S. 188, 192; *United States* v. *Classic*, 313 U.S. 299, 309; *United States* v. *Petrillo*, 332 U.S. 1, 5; *ibid* at 14-15 (concurring opinion of Mr. Justice Frankfurter). We believe that it precludes consideration on this appeal of appellees' arguments based on the statute of limitations and *res judicata*, neither of which was passed upon in the court below and the latter of which was not even raised there.

This Court has rejected efforts far more plausible than the present one to broaden the settled scope of review under the Criminal Appeals Act. In *United States* v. *Borden Co.*, *supra*, for example, the Court held that "When the District Court has rested its decision upon the construction of the underlying statute this Court is not at liberty to go beyond the question of the correctness of that construction and consider other objections to the indictment. The Government's appeal does not open the whole case." 308 U.S. at 193. And this restriction, strictly enforced, required limitation of the appeal to the precise questions of statutory construction upon which the District Court had passed, foreclosing other attacks against the validity of the indictment based on other arguments construing

the underlying statute. The District Court had dismissed an indictment under Section 1 of the Sherman Act on the ground that the defendants were variously exempted from such prosecution by the Agricultural Marketing Agreement Act of 1937 and the Capper-Volstead Act. Rejecting the District Court's views, this Court reversed, refusing to consider, *inter alia*, the contention of the defendant labor officials that the Sherman Act was inapplicable to labor unions or labor union activities. Reiterating the "well settled" rule "that where the District Court has based its decision on a *particular construction* of the underlying statute, the review here under the Criminal Appeals Act is confined to the question of the propriety of *that construction*" (308 U.S. at 207; emphasis added), the Court said: "The District Court did not construe the Sherman Act as inapplicable to these defendants and the Government's appeal, under the restriction of the Criminal Appeals Act, does not present that question." *Id.* at 208.

Here, the argument against consideration of questions not decided below is even clearer. Here, where the single issue resolved by the District Court and presented by the Government's appeal requires construction of the underlying statute, the additional issues appellees seek to raise are sharply different and almost wholly unrelated in character. This is a peculiarly appropriate case, in our view, for reaffirmation of the holdings that where the District Court "has rested its decision upon the invalidity or construction of the statute which under-

lies the indictment, this Court will not go beyond those grounds and consider other objections to the indictment." *United States* v. *Hastings, supra*, at 192.[1]

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[1] The propriety of this conclusion is not altered, in our view, by the recent decision in *United States* v. *Spector*, 343 U.S. 169. There, on the Government's appeal under the Criminal Appeals Act, this Court reversed a dismissal of an indictment under Section 20(c) of the Immigration Act of 1917, as amended, 8 U.S.C., Supp. V, 156(c), holding that the District Court had erred in concluding that the statute was unconstitutionally vague and indefinite. Having disposed of this issue, the Court went on to say (p. 172):

> Another question of constitutional law is pressed upon us. It is that the statute must be declared unconstitutional because it affords a defendant no opportunity to have the court which tries him pass on the validity of the order of deportation. That question was neither raised by the appellee nor briefed nor argued here. If it had been, we might consider it. See *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 330. But when a single, naked question of constitutionality is presented, we do not search for new and different constitutional questions. Rather we refrain from passing on the constitutionality of a phase of a statute until a stage has been reached where the decision of the precise constitutional issue is necessary. See *United States* v. *Petrillo, supra*.

This suggestion that a second constitutional issue might have been considered, though it had not been passed upon by the District Court, does not aid the appellees here. For it merely reflects the special rule announced in the *Curtiss-Wright* decision (the relevant passage of which is cited in the portion of the *Spector* opinion we have quoted) which has never been thought to be inconsistent with the prior and subsequent decisions we rely upon as controlling here. This rule—that grounds of constitutional invalidity not specifically passed upon by the District Court may be examined before reversing a decision holding the statute invalid—leaves otherwise intact the general rule that on the Government's appeal "review is confined to the questions of statutory construction and validity decided by the District Court." *United States* v. *Classic*, 313 U.S. 299, 309.

II

The Contention That Prosecution Is Barred by the Statute of Limitations Is, In Any Event, Without Merit

The appellees contend that "the crime was complete when the defendant filed the alleged fraudulent return" (Brief 8) and that the prosecution for the subsequent false statements to Treasury agents, though brought within six years, is precluded by the statute of limitations, which has run against an attempt to prosecute on the basis of the return. In a sense this argument is merely a variant of the argument that the false statements to Treasury agents could not constitute a violation of Section 145(b). For if, as we have sought to show in our main brief, the offense can be committed by means of such statements, it makes no difference that the offense can be, and may have been, committed by other means on another occasion.[2] This does not necessarily mean, of course, that the appellees in this case could have been convicted and sentenced twice—once for the false return and again for their false oral statements, assuming that the attempted evasion was the same in both cases. Cf. *United States* v. *Adams*, 281 U.S. 202. It only means that

[2] It is interesting to note in this connection that the appellees, seeking to defend the District Court's decision on other grounds, have all but abandoned the single ground advanced by that Court. The appellees not only concede, but insist, that a false tax return can serve as a method of committing a crime under Section 145(b). If they are right in this, as we think they clearly are, the District Court was wrong in holding that false statements punishable under former Section 35(A) of the Criminal Code cannot be violative of Section 145(b). In this respect, we pointed out at p. 15 of our main brief, it is all one whether the false statements are written or oral.

the appellees, merely by assuming *arguendo* that they were once guilty of a crime for which they cannot be prosecuted, are in no position to claim that they could thereafter engage with impunity in the willful attempts to evade which constitute that crime.

This Court's decision in *United States* v. *Johnson*, 319 U.S. 503, squarely refutes the appellees' argument. There, conviction for the willful attempt denounced by Section 145(b) was held proper as to defendants who had nothing to do with the taxpayer's false return. The acts for which those defendants were convicted both preceded and followed the filing of returns (319 U.S. at 515), and included false statements to government agents. See our main brief, p. 15, n. 8. The appellees here are surely no better off for their insistence that they themselves could, but for the statute of limitations, have been prosecuted for filing a false return.

The conclusion that a willful attempt to evade taxes cannot be made after the tax return has been filed would fail as an original proposition after brief reflection on our taxing system. That system, contemplating that taxpayers are liable either to make mistakes or be dishonest, provides in detail for efforts toward tax assessment and collection following the filing of a return. For example, Section 57 of the Internal Revenue Code provides that "As soon as practicable after the return is filed the Commissioner shall examine it and shall determine the correct amount of the tax."

Section 276(a) provides that "In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time."[3] And Section 293(a) provides a five percent addition to any deficiency resulting from negligence, while subsection (b) of the same section imposes an addition of fifty percent where "any deficiency is due to fraud with intent to evade tax * * *." These provisions are merely illustrative of a fact which is common knowledge—that the Government's agents are under a duty to continue, frequently for some time after an honestly mistaken or fraudulent return has been filed, the work of collecting taxes.

In these efforts, as in the initial return, the gist of the problem is discovery of the economic facts upon which the tax is predicated. Willful attempts at evasion through concealment and misrepresentation may be perpetrated, therefore, by actions subsequent to the return as well as in the return itself. Cf. *Levy* v. *United States*, 271 Fed. 942 (C.A. 3) (conviction for false amended return though no such return required or provided for by statute); *Norwitt* v. *United States*, 195 F. 2d 127, 133-134 (C.A. 9), certiorari denied, October 13, 1952, No. 57, this Term (same, rejecting argument that "once the attempt has been consummated by

[3] See *Goldberg* v. *Commissioner*, 100 F. 2d 601 (C.A. 7), certiorari denied, 307 U. S. 622; *Howell* v. *Commissioner*, 175 F. 2d 240 (C.A. 6); *Greenfeld* v. *Commissioner*, 165 F. 2d 318 (C.A. 4).

the filing of a false and fraudulent return in any particular year, the offense has been completed for that year"); *United States* v. *Smith*, 13 F. 2d 923, 924 (W. D. La.) (any act, "such as the making of a fraudulent original return, or the filing of subsequent fraudulent proofs, affidavits, etc., whether they be in the nature of an amended return or what not, where the effect and reasonable purpose would be to evade or defeat the tax, would constitute the offense"). Indeed, it is entirely possible that a taxpayer, after filing a merely mistaken return, might subsequently lie after discovering his mistake in an effort to conceal it and evade his taxes, committing the offense for the first and only time by these later actions. Cf. *United States* v. *Adams*, 281 U.S. 202, 205.

Against these considerations, the appellees insist in vain that the offense could only have been committed if they filed a false return—a fact which is, of course, not established by the record in this case—and not thereafter, as the indictment alleges.

III

The Defense That the Indictment Is Barred By *Res Judicata*, If Open Here, Must Nevertheless Fail

Raising this defense for the first time in this Court, the appellees argue (Brief 11-12) that the question presented by the Government's appeal "is the exact question decided by the memorandum opinion and decision dismissing the first indictment [R. 7-8, 10-11] as it is the basis for the conclusion that the indictment was duplicitous." The

record, which shows that the issue presented in this case was not presented or resolved in the earlier case, refutes this contention.

The prior indictment (R. 7-8), like the present one (R. 2), charged the making of false statements to Treasury representatives on October 24, 1945. Unlike the present indictment, the earlier one went on to allege that these false statements were made "for the purpose of supporting, ratifying, confirming and concealing the fraudulent and incorrect statements and representations made in the corporate tax return * * * on or about January 5, 1945 * * *." Moving to dismiss (R. 9), the appellees made no mention of the contention that the false statements of October, 1945, could not constitute a violation of Section 145(b)—a contention they now claim was sustained by the granting of their motion. Instead, they pleaded (1) the statute of limitations and (2) that the indictment was "duplicitous in that it charges violation of 26 U. S. C. Section 145(b) and Title 18 U. S. C. Section 80." And it was these precise defenses, neither of which concludes the merits of the present indictment (see *United States* v. *Oppenheimer*, 242 U. S. 85, 87; *Restatement, Judgments*, § 49), which resulted in dismissal of the first indictment.

Dismissing the first indictment, Judge Sweeney held (R. 10) that, because more than six years had elapsed since the filing of the allegedly false return, prosecution under Section 145(b) on the basis of that return was barred. Turning to the

subsequent false statements, Judge Sweeney wrote (R. 11):

> The present indictment in one count seeks to revive the action by charging a violation of 26 U. S. C. A. § 145 (b), *plus the making of false statements at a hearing and conference* before the representatives and employees of the United States Treasury Department on October 24, 1945. *This is bad pleading.* If the United States wanted to allege a violation of 18 U. S. C. A., (1940 ed.) § 80, (18 U. S. C. A., § 1001, 1948 ed.), for the making of false statements, it should have set it forth succinctly in the language of the statute. The statute of limitations having run, the action could not be revived by the mere charge of subsequent false statements. [Emphasis added.]

It is clear, of course, that the Government might in that first indictment have charged the two offenses to which the District Judge referred, regardless of whether only a single punishment would have been permissible. *Cf. Gaunt* v. *United States*, 184 F. 2d 284 (C. A. 1), certiorari denied, 340 U. S. 917. It is equally clear that the Court read the indictment as attempting such a charge, and held the indictment duplicitous, as the appellees had contended it was, for this reason.

The appellees insist, however, that this conclusion necessarily resulted from an assumption that the false oral statements of October, 1945, could not constitute the offense of willful attempt to

evade under Section 145(b) of the Internal Revenue Code. They press this analysis of Judge Sweeney's reasoning despite the fact that there is no statement of such a ground for the dismissal either in the opinion or in the motion which that opinion sustained. The short answer, we think, is that this speculative logic, nowhere expressed in the record, cannot conclude an issue which, for all that appears, was never considered at all by Judge Sweeney. What is decisive here is that the first indictment (apart from the limitations question, which is considered above) was dismissed for duplicity, not for the conclusion on the merits which the appellees seek to read into that adjudication.

Judge Sweeney's finding of duplicity may have been wrong. It may, in addition to the expressed reasoning, which does not support the appellees' contention, have been predicated on a variety of reasons, logical or illogical. The appellees suggest no reason why, where an indictment has been held invalid as duplicitous, the Government may not seek another indictment which remedies this asserted defect merely because the finding of duplicity may conceivably have resulted from an unexpressed view on the merits. Whatever its reasoning, whether correct or incorrect, a dismissal which is not on the merits adjudicates only the procedural question on which it is based. *Cf. Restatement, Judgments,* § 67. Having sought precisely such an adjudication, the appellees have no ground for asserting that it must now be read as

a judgment on the merits which their motion to dismiss neither sought nor required.

We note, finally, that the nature of this argument emphasizes the impropriety of the effort to present it on this limited appeal under the Criminal Appeals Act. The argument involves construction of two indictments, a function peculiarly appropriate for the District Court in the first instance. *Cf. United States* v. *Borden Co., supra,* at 193. It poses for the first time here a claim that appellees obtained in the first prosecution a ruling which they do not appear to have sought. Apart from any question of this Court's power, it is an argument, we submit, which should be left for the District Court. *Cf. United States* v. *Malphurs,* 316 U. S. 1, 3.

Respectfully submitted.

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OCTOBER 1952.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1952 227014 841